ONG CHAI HOON v. TAN AH NEK & ORS

HIGH COURT SABAH & SARAWAK, KUCHING
CHRISTOPHER CHIN SOO YIN JC
[ORIGINATING SUMMONS NO: KCH-24-86-9-2019]
2 JULY 2020

FAMILY LAW: *Marriage – Dissolution of marriage – Deceased husband previously married to another before marrying wife – Dissolution of previous marriage not registered – Claim by wife for deceased husband's derivative pension not approved by authorities upon discovery that previous marriage was never dissolved – Whether wife lawful wife, widow and/or dependant of deceased husband – Whether court empowered to dissolve previous marriage without application by parties to previous marriage – Whether court may order dissolution of marriage in absence of decree nisi or identical order – Law Reform (Marriage and Divorce) Act 1976, s. 4(3)(b)*

The plaintiff was married to one Simon ('deceased') and they lived as husband and wife for 26 years. The deceased was previously married to the first defendant and, when they divorced, the dissolution of the marriage was not registered with the Director-General of the National Registration Department ('fourth defendant'). This proved to be a problem when the deceased passed away. Following the deceased's demise, the plaintiff applied to the Director-General of the Public Service Department, Malaysia ('second defendant') to claim for the deceased's derivate pension. The claim was initially approved. However, the second defendant retracted the approval upon the discovery that the deceased's marriage to the first defendant was never dissolved. According to the second defendant, the plaintiff was not entitled to the deceased's derivative pension as she was not the deceased's widow. The plaintiff commenced the present action ('encl. 1'), seeking (i) a declaration that the plaintiff was the lawful wife, widow and/or dependant of the deceased; (ii) an order that the Majlis Adat Istiadat Sarawak ('third defendant') recognise the marriage between the plaintiff and the deceased solemnised before a Penghulu in 1992 under Adat Iban; (iii) an order that the second defendant approve the plaintiff's application for derivative pension; and (iv) an order that the fourth defendant rectify the marital status of the deceased. In support of encl. 1, the plaintiff submitted that, *inter alia*, (i) the court has the power to make such a declaration favouring the plaintiff by virtue of s. 4(3)(b) of the Law Reform (Marriage and Divorce) Act 1976 ('Act'); (ii) the first defendant's statutory declaration confirmed that the marriage between her and the deceased had been dissolved and they have been separated for 38 years; and (iii) the fact that the first defendant did not file any opposition showed that she conceded and admitted to the plaintiff's contentions and evidence.

Held (dismissing encl. 1; plaintiff at liberty to file afresh):

(1) Section 4(3)(b) of the Act suggests the power of the court to dissolve only marriages registered under the Act. However, the reference in the section to '… religion, custom or usage under which it was solemnized' clearly suggests that marriages could be registered under regimes or systems other than the procedure and formalities prescribed by the Act. Section 4(3)(b) of the Act allows the court to recognise dissolution of marriages ordered by a court outside jurisdiction if the court is satisfied that the order of dissolution emanated from a court of competent jurisdiction. The word 'order' is to be read as to mean any nature of court order and not exclusively referring to a *decree nisi* or absolute as provided under the Act. (paras 31, 32 & 34)

(2) The court could not declare the plaintiff as the widow. The only way for the plaintiff to be declared as the widow of the deceased, by Adat Iban, was if the marriage between the deceased and the first defendant was declared as having been dissolved. However, there was no application by the parties to the marriage, either by the deceased or the first defendant, to dissolve their marriage. Nowhere in the Act is there a provision stipulating the circumstances of general power to allow the court to recognise or order of a dissolution of a marriage in the absence of a *decree nisi* or an identical order. (paras 29, 30 & 36)

(3) To dissolve a marriage such as the one between the deceased and the first defendant, a prerequisite to the exercise of such discretion must stem from an application by a party to that marriage itself. An application could be made under s. 4(3) of the Act by any other aggrieved person who has been prejudiced by some pre-existing legal right. The plaintiff was essentially a third party to the marriage between the deceased and the first defendant. To allow her to successfully apply to dissolve a marriage would open the door to any third party seeking to dissolve marriages of parties of which he/she had no cogent connection with. The principles relating to *locus standi* would be breached. (paras 43 & 44)

Case(s) referred to:

Eeswari Visuvalingam v. The Government of Malaysia [1990] 1 CLJ 426; [1990] 1 CLJ (Rep) 111 SC ***(refd)***

Isabela Madeline Roy & Ors v. Sarimah Low Abdullah & Ors [2004] 8 CLJ 302 HC ***(refd)***

Ng Kah Leng v. Lai Chuan Sheng [2017] 1 LNS 1881 HC ***(refd)***

Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor [1996] 4 CLJ 716 FC ***(refd)***

Legislation referred to:

Law Reform (Marriage and Divorce) Act 1976, ss. 4(3)(b), 46, 50, 61, 62, 108

Rules of Court 2012, O. 2

For the plaintiff - Wong Hock Siong & Steven Sia; M/s Wong Sia & Co Advocs
For the 2nd & 4th defendants - Jessica Lee; FC, Kuching
For the 3rd defendant - Lonie Pinda; State Legal Counsel, Sarawak

Reported by Najib Tamby

JUDGMENT

Christopher Chin Soo Yin JC:

The Application To Be Decided

[1] The plaintiff filed her originating summons (encl. 1) dated 24 September 2019 seeking:

1. A declaration that the Plaintiff is the lawful wife, widow and/or dependant of the deceased, Simon Dublin (WN.KP.380202-13-5075);

2. An Order that the 3rd Defendant do recognise the marriage between the Plaintiff and the deceased, Simon Dublin (WN.KP.380202-13-5075) solemnised before a Penghulu on 5.7.1992 under Adat Iban as monogamy and thus a valid marriage under Adat Iban 1993;

3. An Order that the 2nd Defendant do approve the Plaintiff's application for derivative pension;

4. An Order that the 4th Defendant do rectify the marital status of the deceased, Simon Dublin (WN.KP.380202-13-5075);

5. Costs;

6. Such further and/or other orders, directions and/or reliefs as this Honourable Court deems fit and proper in the circumstances.

Factual Matrix

[2] The tragic facts of this case again remind us of the prophetic genius of William Shakespeare when he gushed, "the course of true love never did run smooth …" (A Mid-Summer's Night's Dream). The key facts are as averred by the plaintiff in her affidavit in support (encl. 2) which were substantially unchallenged in terms of the various matrimonial or family events.

(i) Simon Dublin ("the deceased") married Tan Ah Nek @ Fanny Tan ("Fanny") on 26 December 1964 and this marriage was duly registered;

(ii) The deceased and Fanny were alleged to have divorced on 19 December 1980. Such alleged dissolution was not registered with the Registrar General/the fourth defendant and the manner of such dissolution is not known;

(iii) The deceased and Fanny separated and lost contact with each other since about 7 October 1987;

(iv) The deceased then married the plaintiff on 5 July 1992 in accordance with Adat Iban before Penghulu Kalong Ak O.K. Jemat and lived as husband and wife for 26 years until the demise of the deceased in 2018;

(v) The deceased and the plaintiff brought up the three children, presumably, from the marriage between the deceased and Fanny. They are Danny Ak Simon Dublin (born 1981), Sophia Anak Simon Dublin (born May 1985) and Venus Dublin Anak Simon Dublin (born March 1985) (there is no explanation how the last two issues were registered as being born barely two months apart);

(vi) Fanny "married" another man named "Sippo Antti Sippola" of Abbotsford, British Columbia, Canada which marriage was registered in Las Vegas, Nevada, USA on 5 May 1997;

(vii) The deceased, a pensioner, passed away on 20 May 2018 of heart failure;

(viii) After the demise of the deceased, the plaintiff on 20 May 2018 sought to claim his derivative pension (of RM1,877.06 per month) and this was initially approved;

(ix) On 26 July 2018, one Arthur Dublin applied to the second defendant for the derivative pension of the deceased on behalf of his mother, Fanny, and disclosing to the second defendant that the deceased was married to his mother, Fanny and that this union was never dissolved; and

(x) The second defendant then retracted the approval to the plaintiff to the pension of the deceased.

The Problem Faced By The Plaintiff

[3] The problem faced by the plaintiff is that the alleged divorce between the deceased and Fanny was never registered or recorded as dissolved. Hence the records or register of the second and fourth defendant disclose that the deceased and Fanny were and are still registered as married. With that, the plaintiff is not entitled, as she is not the widow to the derivative pension of the deceased.

[4] This inability by the plaintiff to be recognised as the lawful widow of the deceased and hence to claim his derivative pension is the root cause of this action.

The Stand Of The Second Defendant

[5] The stand taken by the second defendant is predictable.

[6] In essence, they say that the plaintiff is not widow of the deceased because the deceased's marriage with Fanny was never dissolved or annulled.

They quote s. 62 of the Law Reform (Marriage and Divorce) Act 1976 which expressly provides that a party to a former marriage can only remarry once a decree of divorce has been made absolute. There is no decree of divorce produced by the plaintiff in proving that the deceased, at the time of his marriage to the plaintiff, had already divorced Fanny. Therefore, they submitted that the deceased at all material time had no capacity to remarry, and this would render the plaintiff's marriage with the deceased not valid under the Law Reform (Marriage and Divorce) Act 1976.

[7] The fourth defendant additionally submitted that the burden is on the plaintiff to prove that marriage between Fanny and the deceased had been dissolved prior to the plaintiff's marriage with the deceased. However, there is no evidence provided by the plaintiff to prove her contention. There was no decree of divorce produced before this court proving that the deceased and Fanny had dissolved their marriage.

[8] Section 61 of the 1976 Act expressly stated that every decree of divorce shall be in first instance be a *decree nisi* and the same section states that parties to a former marriage can only remarry once a decree of divorce has been made absolute. (see Tab 4 & 6 of the second defendant's bundle of authorities).

[9] The second defendant cited the case of *Isabela Madeline Roy & Ors v. Sarimah Low Abdullah & Ors* [2004] 8 CLJ 302; [2005] 2 MLJ 521, where the court held that:

> (1) The Court must presume, until the contrary is proven, that the deceased and the first Defendant were both alive when the deceased entered into the civil marriage with the second defendant. Since there was the certificate regarding the marriage of the deceased and the first defendant in 1957, the burden shifts to the other defendants to prove facts showing that the deceased had the capacity (through dissolution of marriage by divorce, nullity or death of the first defendant) to marry the second defendant.

[10] The second defendant also cited the case of *Eeswari Visuvalingam v. The Government of Malaysia* [1990] 1 CLJ 426; [1990] 1 CLJ (Rep) 111; [1990] 1 MLJ 86, where the appellant was married to the deceased on 15 November 1950 under the Hindu Marriage Registration Enactment and the deceased later converted to Islam before his death. The wife later applied for the derivative pension and was rejected on the grounds that she was not a "widow" under the pension laws as she did not convert to Islam within three months of her husband's conversion". The court in this case held that, there is no evidence that the marriage of the appellant and deceased had been dissolved. Since the marriage remained valid under the civil law at the time of the death of the husband, the appellant is therefore a dependant under the pension laws and entitled to a derivative pension. (please see Tab 8 of the second defendant's bundle of authorities).

[11] Finally, the second defendant quoted s. 46 of the 1976 Act (see Tab 9 of the second defendant bundle of authorities) which provides that every marriage register kept under this Act and any copy of such entry certified by the Registrar shall be *prima facie* evidence of the dates and acts contained in such marriage register.

[12] The stand taken by the second defendant as the Registrar of Marriages is understandable and totally expected. They can act only within the confines of the 1976 Act and the Rules made thereunder. The 1976 Act did not afford the second defendant any discretion, mechanism or procedure to decide otherwise.

The Stand Of The Third Defendant

[13] The stand taken by the third defendant is embodied in their letter dated 8 October 2018 addressed to the plaintiff (exh. O5 to encl. 2) (words in brackets added):

> 2. Adalah dimaklumkan bahawa permohonan puan tidak diluluskan kerana menurut Adat Iban (Sekysen 131), perkahwinan kaum Iban adalah monogami. Oleh kerana semakan dengan pihak Jabatan Pendaftaran Negara (JPN) menyatakan bahawa gemulah Simon Dublin (the Deceased) masih ada ikatan perkahwinan dengan Puan Tan Ah Nek @ Fanny Tan (Fanny). Maka perkahwinan gemulah Simon Dublin dengan Puan Ong Chai Hoon (the Plaintiff) yang telah didaftarkan mengikut Adat Iban 1993 melalui surat Nikah A No. LDU/M/000238/2015 adalah tidak diiktiraf sah mengikut keputusan yang di perolehi daripada Majlis Adat istiadat Sarawak melalui surat bertarikh 28 September 2018.

The Stand Taken By The Fourth Defendant

[14] The fourth defendant stand is to raise a preliminary objection against the plaintiff's originating summons.

[15] In essence, they are saying that the plaintiff's action should have been commenced by a petition as mandated by s. 108 of the Law Reform (Marriage and Divorce) Act 1976 and not by way of an originating summons.

> **Rule 7 of the Divorce and Matrimonial Proceedings Rules 1980** clearly provides as follow:
>
> 7. Cause to begun by petition.
>
> (1) Every cause other than application under section 50 of the Act shall be begun by petition
>
> (2) …
>
> (3) … (Tab A of the 4th Defendant's Bundle of Authorities)

[16] The fourth defendant therefore says that for any proceedings under the 1976 Act other than application under s. 50 shall be begun by way of petition and not by way originating summons. The plaintiff has misdirected herself when she is applying for a dissolution of marriage by way of the originating summons.

[17] The fourth defendant also argues that the plaintiff has no *locus standi* to bring this action.

The Arguments And Submissions Of The Plaintiff

[18] The plaintiff makes two main points.

[19] Firstly, that this court has the power to make such a declaration favouring the plaintiff by virtue of **s. 4(3)(b) of the 1976 Act** (emphasis added):

> Every such marriage, unless void under the law, religion, custom or usage under which it was solemnised, shall continue until dissolved:
>
> (a) by the death of one of the parties;
>
> (b) by **order of a court of competent jurisdiction**; or
>
> (c) by a decree of nullity made by a court of competent jurisdiction
>
> (emphasis added)

[20] "Order" in this case, they argue, need not be a *decree nisi*.

[21] Secondly, the plaintiff seeks this court's intervention by way of equitable relief. She quoted the maxim, "equity follows the law". Equity, she argues will not allow a remedy that is contrary to the law. In support of this contention, she cites the case of *Ng Kah Leng (P) v. Lai Chuan Shenq (L)* [2017] 1 LNS 1881; [2017] MLJ 1552, the decision of the learned Hayatul Akmal Abdul Aziz JC who relied on the Federal Court case of *Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor* [1996] 4 CLJ 716; [1996] 1 MLJ 113. In this case, the Federal Court held that the equitable jurisdiction by which a personal bar is placed on a litigant from raising or relying upon the provisions of a statute is also contained in the maxim, "equity will not permit a statute to be used as an engine of fraud".

[22] Finally, in the plaintiff's submission in reply, she summarises the unchallenged facts available to this court as follows:

> [3] As submitted in the Plaintiff's main submission and additional submission, evidence that is available before this court are as follows:
>
> a) The 1st Defendant's Statutory Declaration confirming that she and the deceased husband was already dissolved on 19.12.1980. The 1st Defendant and the deceased husband has been separated for 38 years;

A b) The 1st Defendant and the deceased husband did not know the whereabout of each other since year 1987;

c) The deceased Husband had married the Plaintiff in 7.5.1992;

d) The 1st Defendant had married another man, Antti Sippola in Las Vegas on 5.5.1997;

B

e) The deceased husband's pension card named the Plaintiff as the wife;

f) the 1st Defendant did not file any Affidavit in Opposition to the Plaintiff's action and thus, the Affidavit evidences of the Plaintiff is not disputed and admitted by the 1st Defendant.

C

[4] It should be noted that all the above evidence is UNDISPUTED. As such, it must be taken as GOOD EVIDENCE until rebutted.

[5] Whether or not there is a *decree nisi* absolute is within the knowledge of the 1st Defendant. The fact that she did not file any affidavit in opposition shows that the 1st Defendant concede and admit to all the contentions and evidence of the Plaintiff.

D

Reasoning Of This Court

The Current State Of Affairs

E **[23]** The deceased and Fanny cease to be living as husband and wife for close to four decades.

[24] The only thing missing from this marital breakdown is evidence of a formal order for the dissolution of their marriage.

F **[25]** The deceased and the plaintiff lived as husband and wife until the deceased's demise, and during this period they raised three children, presumably from the deceased's marriage with Fanny, the first defendant.

[26] Fanny recognised that her marriage had ceased with the deceased. She married a second time at Las Vegas to another man. She had stated on a G statutory declaration that she was not married to the deceased. This statutory declaration was not sworn for any matrimonial purpose but was in respect of an official immigration form for her children from her union with the deceased.

[27] There is no evidence that the deceased went back to Fanny during the H time he was living with the plaintiff.

[28] The above facts are not challenged or controverted by any assertions in any affidavits from any of the defendants, in particular the first defendant.

I

Section 4(3)(b) Of The 1976 Act

> Every such marriage, unless void under the law, religion, custom or usage under which it was solemnised, shall continue until dissolved:
>
> (a) by the death of one of the parties;
>
> (b) by **order of a court of competent jurisdiction**; or
>
> (emphasis added)

[29] The only way for the plaintiff to be declared the widow (by Adat Iban) of the deceased is if the marriage between the deceased and Fanny is declared as having been dissolved.

[30] What is clear is that there is no application by the parties to this marriage (either the deceased or Fanny) before this court to dissolve their marriage. This court cannot declare the plaintiff as the widow unless such marriage of the deceased is first dissolved.

[31] Section 4(3)(b) above suggests that the power of this court to dissolve only marriages registered under the Act. However, it says more than that. The reference in the section to "… religion, custom or usage under which it was solemnised" clearly suggests that marriages can be registered under regime or systems other than the procedure and formalities prescribed by the 1976 Act.

[32] This court has exercised this power under s. 4(3)(b) typically where a couple who married abroad and who eventually registered their marriage under the 1976 Act through the Malaysian Embassy, later divorced in the country where the marriage was originally solemnised and then sought under this provision of the 1976 Act to register such divorce in Malaysia. This court would then need to scrutinise if the foreign court was of competent jurisdiction to dissolve that marriage.

[33] In other words, s. 4(3)(b) of the 1976 Act allows this court to recognise dissolution of marriages ordered by courts outside the jurisdiction if this court is satisfied that the order of dissolution emanates from a court of competent jurisdiction.

[34] Hence, I would read the word "order" to mean any nature of court order and not exclusively referring to a *decree nisi* or absolute as provided under the 1976 Act.

[35] When Parliament passed this 1976 Act, which had the effect of henceforth requiring all marriages and their dissolution to be in accordance with this 1976 Act, they provided the courts with power under this s. 4(3) to dissolve marriages even where such marriages do not neatly fall within the procedural framework of the 1976 Act. As in the example in para. [32] above, this court can recognise a dissolution of a marriage if this court is satisfied that the foreign court granting the dissolution is of competent jurisdiction.

[36] However, nowhere in the 1976 Act is there a provision stipulating the circumstances or general power to allow this court to recognise or order a dissolution of a marriage in the absence of a *decree nisi* or identical order.

[37] The above section does not state who can or must be the applicant to court for this power to be exercised.

[38] If it was Parliament's intention to generally empower this court to declare the validity or continuation of a marriage, they would have provided for parameters or circumstances when such was allowed.

Equity

[39] The submissions by the plaintiff on the role of equity is clear and this court has the power to right a wrong and to prevent an injustice. An issue which would arise for equitable relief is whether the plaintiff's union with the deceased who was still married to Fanny at the ceremony before the Penghulu with bigamy is tainted.

Conclusion

[40] Firstly, I exercise my discretion under O. 2 of the Rules of Court 2012 to waive any procedural shortcomings (if any) by the parties to this action.

[41] While this court wholly sympathises with the plight of plaintiff and recognises that this court has the power, in the interest of justice, to dissolve a marriage such as the one between the deceased and Fanny, a prerequisite to the exercise of such discretion must stem from an application by a party to that marriage itself.

[42] This court further envisages a recognisable and allowable application made under the said s. 4(3) by any other aggrieved person who has been prejudiced by some pre-existing legal right.

[43] The plaintiff is essentially a third party to the marriage between the deceased and Fanny. To allow her to successfully apply to dissolve a marriage would open the door to any third party to seek to dissolve marriages of parties of which he or she has no cogent connection with. The principles relating to *locus standi* would be breached.

[44] There is no evidence before me that Fanny seeks to have her marriage with the deceased dissolved, and neither is there such an application by the legal representatives of the deceased.

[45] The plaintiff has sought in encl. 1 for a declaration that she "is the lawful wife, widow and/or dependant of the deceased,". I can do so only if I first dissolve the marriage between the deceased and Fanny. Even if I do that now, it does not help the plaintiff as at the time of her "marriage" under Adat Iban, the deceased was already married and hence his union with the plaintiff was potentially bigamous from inception and which under Adat Iban is, in any event, not capable of recognition.

[46] Likewise, the second prayer of the plaintiff that, "the third defendant do recognise the marriage between the plaintiff and the deceased solemnised before a Penghulu on 5 July 1992 under Adat Iban as monogamy …" requires that I first dissolve the marriage between the deceased and Fanny on a date prior to the deceased's alleged "marriage" with the plaintiff before the Penghulu. I am not prepared to consider this now in the present absence of an application to that effect by Fanny herself.

[47] Unless the circumstances or application is supported by a deliberate action on the part of Fanny (and not mere silence or deemed acquiescence) this court now rules that the application by the plaintiff (encl. 1) fails and as a consequence is dismissed. I make no order for costs. The plaintiff in this case is at liberty to file afresh should the circumstances change.